IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1077

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, *et al.*,

Petitioners,

VS.

JAMES JONATHAN MAPP, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit of October 20, 1975 is reported at 525 F.2d 169 (6th Cir. 1975). Its opinion denying rehearing and rehearing *en banc* on January 27, 1976 is now reported at 527 F.2d 1388 (6th Cir. 1976).

Question Presented

Respondents submit that petitioners' third question, *Petition* p. 4, should read as follows:

> Did the lower courts err in rejecting a student assignment plan proposed by the Board of Education of

Chattanooga, Tennessee that would have perpetuated the existence of numerous all-black schools and have increased black percentages in other majority-black schools in order to ensure that as many white children as possible attended majority-white schools.

Statement of the Case

This school desegregation litigation was filed on April 6, 1960 on behalf of a class of black children and parents (respondents herein) seeking an end to state-imposed racial segregation in Chattanooga, Tennessee public schools. Though respondents have certain problems with the Statement of the Case by the petitioners (hereinafter, "the Board") we would submit that a full discussion of these matters is already contained in our petition, *James Jonathan Mapp* v. *The Board of Education of The City of Chattanooga, Tennessee,* 44 U.S. L.W. 3626 (U.S. April 27, 1976) (No. 75-1564) seeking review of lower court refusals to require the development of a new desegregation plan for Chattanooga schools. We would respectfully direct the Court's attention generally to pp. 3-13 of our petition in this respect, rather than repeating that discussion here in its entirety. As we pointed out in that context, a comprehensive desegregation plan was approved in July, 1971 that would have altered in certain regards the dual nature of the Chattanooga system. That plan had not been fully implemented in major respects, however, by the beginning of the 1973-74 academic year. By December, 1973, significant changes had occurred in the racial composition and physical configuration (as a result of annexations) of the system during this interim two and one-half years. Respondents argued that these changes rendered the 1971 desegregation plan obsolete and suggested that only a totally new plan would meet constitutional requirements.

This suggestion and the Board's proposed modification were both rejected by the trial court prior to the commencement of the 1974-75 academic year. Full implementation of the 1971 plan occurred in September, 1974.

We would like to describe briefly here, however, the nature of the Board's proposed modification of the 1971 desegregation plan in light of the petition's silence in this regard. Generally, the avowed purpose of the Board's proposal was to achieve "a viable racial mix" in as many schools in the system as possible. As defined by the Board, "a viable racial mix" was having 20 to 40 percent black students and 80 to 60 percent white students in a Chattanooga school, even though the system-wide ratio at that time was 59% black and 41% white. In order to achieve this goal, the Board's approach was to close two majority-black elementary schools, increase black percentages in three majority-black elementary schools, leave eight elementaries 98-100% black, increase the black percentage at one majority black junior high school, leave four junior high schools 99% black and increase black percentages in two high schools from 95 to 99%. In sum, the Board proposed to create or maintain white majorities in as many schools as possible by increasing or maintaining black percentages in majority-black or all-black facilities. As was indicated *supra*, the Board's proposal came at a time when *no* comprehensive desegregation plan had ever been implemented in Chattanooga.

Argument

Petitioners have raised in their "Questions Presented" and "Statement of the Case" the issue of whether the lower courts were correct in rejecting the Board's 1973 attempt to modify the partially-implemented 1971 de-

segregation plan. To the extent that petitioners desire that issue reviewed, nothing in their petition warrants such consideration by this Court. For the lower courts were required by *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1 (1971) and *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) to reject a plan that proposed to increase black percentages in majority-black schools and to perpetuate the existence of numerous all-black schools within the system.

Moreover, in their "Reasons for Granting the Writ," it becomes clear that what petitioners seek primarily from this Court is review not of that issue but rather of rulings denying respondents' 1973 request for a new desegregation plan. Two of the three questions presented involve rulings favorable to the Board. (*Petition*, at 3-4) And much of the Board's discussion is devoted to demonstrating why the lower court decisions were correct. For example, the Board states:

> The net effect of the respondents' petition in the court of appeals is to impose a completely new desegregation plan upon the Chattanooga system, as a constitutional requirement, at a point in time when CBE has been held to be in compliance by the district court, which judgment has been affirmed by the majority opinion in the court of appeals. How is it possible to justify seeking a completely new plan when the district court's own factual finding says there is no default? (*Petition*, at 17-18)

Subsequently, it argues:

> The respondents persist in their efforts to eliminate the "official action" element from consideration. The current push for a completely new desegregation plan

> for Chattanooga is consistent with this objective. The respondents are blind to the flat holding by the district court that any objectionable racial imbalance remaining was caused by factors "not within any reasonable responsibility of the board." That the affirmative duty had been accomplished was recognized, explicitly by the court of appeals in its affirmance. (*Id.*, at 23-24)

Furthermore, at other points in the petition, the Board holds up the decisions below as models that should guide this Court in resolving broad issues with respect to desegregation allegedly raised but not decided in *Swan*, *supra*. At 20, the Board suggests that while district courts in other cases have ignored state action and causation, the court in Chattanooga did not. At 27, it asserts that district courts in other cases have not given school boards "the benefit of the doubt" with respect to racial balance, whereas the Chattanooga court *did* give such benefit to the Board.

Consequently, the petition for a writ of certiorari is nothing more than an attempt to have this Court review decisions of the district court and court of appeals which were *favorable* to the Board. The granting of a writ of certiorari under these circumstances would be, we submit, highly inappropriate. *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206 (1938).

CONCLUSION

For the foregoing reason, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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